

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 DISTRICT OF NEVADA
9

10 GILBERT PALIOTTA,) 3:11-cv-00121-ECR-WGC
11)
12)
13)
14)
15)
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)
26)
27)
28)

Plaintiff,)
vs.) **ORDER**
THE STATE OF NEVADA, in)
Relation to the NEVADA)
DEPARTMENT OF CORRECTIONS, et)
al.,)
Defendants.)

18 On August 10, 2011, A Notice Regarding Intention to
19 Dismiss Pursuant to Rule 4(m) of the Federal Rules of Civil
20 Procedure (#28) was issued with respect to Defendant Reuben
21 Ladja.¹ On August 19, 2011, Plaintiff filed an "Affidavit in
22 Attempt to Have Summons and Complaint Served Upon Defendant/and
23 Motion Identifying the Unserved Defendant Requesting Issuance
24 of Summons for Unserved Defendant" (#33) which will be treated
25 as a motion to request an order that the United States Marshals
26

27
28 ¹ Defendant Reuben Ladja is alternatively referred to as Reuben Lajda in certain filings. We are unsure of which spelling is the correct one, but proceed by referring to the defendant as "Ladja" rather than "Lajda."

1 Service serve process on Defendant Reuben Ladja. On September
2 1, 2011, Defendants filed a response (#39) to Plaintiff's
3 Motion (#33), which in essence opposed Plaintiff's Motion (#33)
4 for service but notes that defense counsel does not represent
5 Reuben Ladja. On September 12, 2011, Plaintiff filed a reply
6 (#44) in support of his Motion (#33). The reply was filed
7 twice, and the repetitive document (#45) was filed as if it
8 were a new motion. The repetitive document (#45) shall,
9 however, be treated as a reply and not a new motion.

10 "[A]n incarcerated pro se plaintiff proceeding in forma
11 pauperis is entitled to rely on the U.S. Marshal for service of
12 the summons and complaint, and, having provided the necessary
13 information to help effectuate service, plaintiff should not be
14 penalized by having his or her action dismissed for failure to
15 effect service where the U.S. Marshal or the court clerk has
16 failed to perform the duties required of each of them under 28
17 U.S.C. § 1915(c) and Rule 4 of the Federal Rules of Civil
18 Procedure." Puett v. Blandford, 912 F.2d 270, 275 (9th Cir.
19 1990). However, when "the Marshal is unable to effectuate
20 service because the plaintiff has not provided sufficient
21 information to locate the defendant, such plaintiff must remedy
22 the situation or face dismissal of the unserved defendant."
23 Hash v. Lee, No. C 8-3729 MMC (PR), 2011 WL 2693569 at *4 (N.D.
24 Cal. July 8, 2011) (citing Walker v. Sumner, 14 F.3d 1415, 1422
25 (9th Cir. 1994), overruled on other grounds by Sandin v.
26 Conner, 515 U.S. 472, 483-84 (1995)). However, "the Marshals
27 Service is required to 'expend a reasonable investigative
28 effort to locate a [d]efendant once he is properly

1 identified.'" Odom v. Ozmint, 517 F.Supp. 2d 764, 768 (D.S.C.
2 2007) (citations omitted).

3 The Court of Appeals for the Seventh Circuit reviewed a
4 decision of the district court to dismiss defendants pursuant
5 to Federal Rule of Civil Procedure 4(m) after the U.S. Marshal
6 Service failed to serve defendants who no longer worked at the
7 prison. Graham v. Satkoski, 51 F.3d 710, 712 (7th Cir. 1995).
8 The Seventh Circuit noted that "[a]s far as the record
9 indicates, no effort was made to ascertain the defendants' new
10 locations. The district court did not question the marshals'
11 efforts and dismissed the defendants pursuant to Rule 4(m)."
12 Id. The Seventh Circuit discussed a prior holding in which it
13 held that "once the former prison employee is properly
14 identified, the Marshals Service should be able to ascertain
15 the individual's current address and, on the basis of that
16 information, complete service." Id. at 713 (citing Sellers v.
17 United States, 902 F.2d 598, 602 (7th Cir. 1990)). The case was
18 remanded to the district court, with direction to "evaluate the
19 Marshals Service's efforts and the adequacy of the state
20 disclosure procedures in light of Sellers. If the Marshals
21 Service could have obtained the new addresses of the defendants
22 with reasonable efforts, the marshals' failure to serve process
23 was 'good cause' for purposes of Rule 4(m). Of course, if the
24 failure to serve process was due to appellants' failure to
25 cooperate with the Marshals Service, there may not be good
26 cause and dismissal may be appropriate." Graham, 51 F.3d at
27 713. The Ninth Circuit cited Sellers with approval in Walker
28 v. Sumner, agreeing that "[s]o long as the prisoner has

1 furnished the information necessary to identify the defendant,
2 the marshal's failure to effect service 'is automatically good
3 cause within the meaning of Rule 4(j)²." Walker, 14 F.3d at
4 1422 (citing Sellers, 902 F.2d at 603).

5 Defendants' opposition (#39) argues that Plaintiff's
6 Motion (#33) should be denied because Plaintiff has failed to
7 demonstrate that Defendant Ladja was served within 120 days of
8 the filing of Plaintiff's complaint on December 28, 2010, and
9 because Plaintiff has failed to meet his burden of
10 demonstrating good cause for his failure to serve Defendant
11 Ladja by proving that he provided the U.S. Marshal with
12 sufficient information to serve Defendant Ladja and/or that he
13 in fact requested that Defendant Ladja be served within 120
14 days of the filing of the complaint.

15 Plaintiff stated in his Motion (#33) that on January 25,
16 2011, he attempted to have summons and complaint served upon
17 Defendant Ladja through the Nevada Sheriff's Office, and that
18 he received an affidavit of non-service for the reason that
19 Defendant Ladja is no longer in the area. Plaintiff originally
20 filed this complaint in state court. Exhibit A, attached to
21 Plaintiff's Motion (#33), is the summons issued by the Clerk of
22 the Seventh Judicial District Court of the State of Nevada, in
23 and for the County of White Pine, for Reuben Ladja, dated
24 December 28, 2010. Plaintiff provided Defendant Ladja's full
25 name and an Ely address. Exhibit B is an Affidavit of Non-
26 Service by the Sheriff of White Pine County, stating that he

27
28 ² Rule 4(j) refers to current Rule 4(m).

1 received the summons on February 2, 2011, and was unable to
2 serve Reuben Ladja at Ely State Prison because he is "no longer
3 in area." Plaintiff further states in his Motion (#33) that
4 this is his second affidavit in support of his effort to have
5 Ladja served after the initial summons was returned unexecuted.
6 Exhibit C is Plaintiff's Affidavit in Attempt to Have Summons
7 and Complaint Served Upon Defendant, filed on February 11,
8 2011. The case was removed to this Court on February 17, 2011.
9 While the case has been pending for some time, we shall grant
10 Plaintiff additional time to serve Defendant Ladja because he
11 appears to have diligently pursued service in state court.
12 There may have been an oversight in transferring the duty to
13 serve Ladja in federal court, but upon consideration of the
14 caselaw and the equities in this case, the Court shall not
15 dismiss Defendant Ladja before reasonable efforts to locate him
16 have been made.

17
18 **IT IS, THEREFORE, HEREBY ORDERED** that Plaintiff's motion
19 to require service on Defendant Ladja by United States Marshal
20 Service (#33) is **GRANTED**.

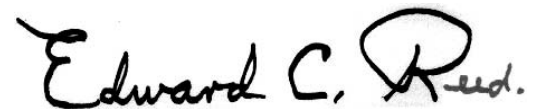
21
22 **IT IS ORDERED** that the Office of the Attorney General
23 shall file the last known address of Defendant Reuben Ladja (or
24 Reuben Lajda) **under seal** on or before November 22, 2011. The
25 last known address of Reuben Ladja shall be kept under seal by
26 the court and shall not be provided to the plaintiff.

27
28 **IT IS FURTHER ORDERED** that the Clerk shall issue summons

1 for Reuben Ladja and send the same to the U.S. Marshal with the
2 address provided under seal by November 30, 2011. The Clerk
3 shall also send to plaintiff a USM-285 form, a copy of the
4 amended complaint (#10), and a copy of this Order by November
5 30, 2011. Plaintiff shall have until December 13, 2011 to
6 complete the USM-285 service form and return it along with the
7 other documents to the U.S. Marshal for service.

8
9 **IT IS FURTHER ORDERED** that Plaintiff shall be granted an
10 additional ninety (90) days after the date of entry of this
11 Order within which to serve Defendant Ladja through the U.S.
12 Marshal Service. The 4(m) notice with respect to Defendant
13 Ladja (#28) is **WITHDRAWN** at this time.

14
15 Dated this 7th day of November 2011.

16
17 

18 EDWARD C. REED, JR.
19 United States District Judge
20
21
22
23
24
25
26
27
28